76-5147

No.

Supreme Court, U. S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1976

ROBERT L. BELL, d/b/a CRESCENDO PUBLISHING COMPANY,

Petitioner,

vs.

COMBINED REGISTRY COMPANY, AN ILLINOIS CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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COMBINED REGISTRY COMPANY, AN ILLINOIS CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Robert L. Bell petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The decision and opinion of the district court (App.A, *infra*, pp. 1a-15a) are reported at 397 F.Supp. 1241 (N.D. Ill. 1975). The decision and opinion of the Court of Appeals for the Seventh Circuit (App.B, *infra*, pp. 16a-26a) have not yet been officially or unofficially reported.

JURISDICTION

The judgment of the court of appeals (App.C, *infra*, p. 27a) was entered May 14, 1976, and a timely petition for rehearing was denied on July 15, 1976 (App.D, *infra*, p. 28a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether, there can be no forfeiture of copyright without a general publication in the United States authorized by the copyright holder.

Whether, copyrighted prose used by a U.S. Army officer in furtherance of his duties is protected from forfeiture.

STATUTES INVOLVED

Section 8 (second paragraph) of Title 17, "Copyrights," 84 Stat. 777, 17 U.S.C. 8, provides:

> "The publication or republication by the Government, either separately or in a public document, of any material in which copyright is subsisting shall not be taken to cause any abridgment or annulment of the copyright or to authorize any use or appropriation of such copyright material without the consent of the copyright proprietor."

Section 10 of Title 17, "Copyrights," 61 Stat. 652, 17 U.S.C. 10, provides:

> "Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor, except in the case of books seeking ad interim protection under section 22 of this title."

Sections 8 and 10, *supra*, were, respectively, sections 7 and 9 of the copyright Act of March 4, 1909, c. 320, 35 Stat. 1077, and were renumbered by Act of July 30, 1947, c. 391, 61 Stat. 652.

STATEMENT

Plaintiff is the owner of the copyright for a brief prose work commonly known as *Desiderata*, a copy of which appears, *infra*, at p. 14a. The work was originally copyrighted in 1927 and the copyright was duly renewed in 1954. The author of the work was Hoosier poet Max Ehrmann and the copyright was taken out in an assumed name, "Indiana Publishing Company." (App.A, *infra*, pp. 4a-5a).

Max Ehrmann received a letter dated July 20, 1942, from United States Army Major Merrill Moore, an army psychiatrist, which stated in part:

> "I think you should know that nearly every day of my life I use your very fine prose poem *Desiderata* in my work. . . . Here I have found your philosophy as useful and have used it considerably as part of the psychotherapy I am doing. . . . I must have given away a thousand copies in the last few years. A patient, a depressed woman, gave it to me once several years ago, with no name attached. . . ." (App. A, *infra*, p. 9a.)

Major Moore asked for a copy in Ehrmann's own hand, and by letter dated August 17, 1942, a Mr. Henry J. Fuller wrote Moore stating that autographed copies of *Desiderata* had been sent to him (*id.*).

A letter by Moore to Ehrmann dated October 5, 1942, acknowledged receipt of the autographed copies and advised Ehrmann that he had given away some or all of

them (*id.*). Responding to Moore's request to give the poem to soldiers "overseas," an Ehrmann letter dated November 3, 1942, stated "you may distribute multigraphed copies of DESIDERATA to the soldiers" (*id.*). In November, 1944, Moore wrote two letters, at least one of them addressed to the copyright proprietor, Indiana Publishing Company, which referred to his continued "use" of *Desiderata* in the Pacific theater (*id.*). The court of appeals expressly found that only these five letters had any probative factual value for the issues in the case (App.B, *infra*, p. 22a).

Defendant published *Desiderata* in the August, 1971 edition of its magazine *Success Unlimited* without permission from plaintiff (or any other person even arguably in the chain of title[1]) without payment of royalty and without a proper notice of copyright. After defendant's failure to meet plaintiff's demand for payment of royalty this suit commenced. Jurisdiction vested in the district court by virtue of 28 U.S.C. 1338(a).

Among defendant's affirmative defenses pleaded in the district court was that this series of events constituted an abandonment by Ehrmann of his copyright. The district court agreed with defendant that an abandonment had occurred and also added that on these facts a statutory forfeiture had occurred as well. As a consequence, it was decided, plaintiff Bell had no cause of action for infringement. The court of appeals took exception to the abandonment finding (App.B, *infra*, p. 26a), but since the court of appeals affirmed the district court decision on the basis of forfeiture no holding was rendered on abandonment.

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[1] Max Ehrmann died in 1945, and his wife, his sole heir, died in 1962, leaving *Desiderata* to her nephew Richmond Wight. Wight in turn assigned the copyright to Bell.

REASONS FOR GRANTING THE WRIT

A. Conflict among the Circuits

The decision below conflicts with the decision in *Bell* v. *Pro Arts*, 511 F.2d 451 (6th Cir. 1975) (App.E, *infra*, pp. 29a-30a), *cert. den.* —— U.S. ——, 96 S.Ct. 47 (1975), where the very same copyright withstood attack. As a result, the subject matter of this case, the *Desiderata* copyright, is valid and enforceable in the Sixth Circuit but forfeited and unenforceable in the adjacent Seventh Circuit. An anomaly is created whereby, for example, an infringement appearing in an Indiana newspaper could be enjoined when distributed across the state line into Ohio, but could not be prevented if distribution somehow were limited to Indiana.

While frequently there is good reason for this court to decline to resolve a conflict in substantive law between two circuits, this Court should resolve the uncertainty created where the very same property right has been validated by one court of appeals and declared invalid by another. The lawful publication without notice of copyright in the Seventh Circuit will of course weaken the public's understanding that the work is privately owned as people and incidental copies move in interstate commerce. This weakening of the public awareness of the work's ownership will inexorably result in more piracy, both intentional and negligent.

The need for this Court's review is especially keen where the uniform treatment of that property right is the underpinning of the publishing and communications industries. These industries thrive on the existence of nation-wide uniformity in the treatment of copyrighted materials. Thus, the chilling effect these opposing decisions place on each party's rights extends as well nation-

wide to the entire publishing industry's use or non-use of the work in question.

The fact that the two courts did not in all respects[2] face and decide the same factual and legal defenses does not obviate the problem caused by the conflict. Copyrights being creatures solely of federal law, only this Court can resolve this conflict.

B. Conflict with Decisions of this Court

The decision below conflicts with *American Tobacco* v. *Werckmeister*, 207 U.S. 284 (1908), and *United Dictionary Co.* v. *Merriam Co.*, 208 U.S. 260 (1907), two copyright cases on different issues that have been uniformly followed until now. Unless this divergence is promptly corrected, the existing uniformity of copyright treatment in the lower courts will be endangered. The former case holds that an authorized improper *general*, as opposed to *limited*, publication was necessary to effect a forfeiture of copyright; the latter case holds that such a publication must occur within the United States to create a forfeiture.

1. American Tobacco is controlling here.

In *American Tobacco* this Court held, that,

> "it is only in cases where what is known as a general publication is shown, as distinguished from a limited publication under conditions which exclude the presumption that it was intended to be dedicated

[2] Although a review of the opinions in the various lower and appellate courts shows that many similar counter-attacks were levelled at the copyright in the two actions, the Ohio district court and the Sixth Circuit Court of Appeals did not express an opinion on the abandonment and forfeiture issues that the seventh circuit courts addressed.

> to the public, that the owner of the right of copyright is deprived of the benefit [of his statutory copyright]." 207 U.S. at 299.

That case was concerned with the public exhibition of a painting which was found to have been of the "limited publication" variety.

Other courts have broadly applied this concept to the printed word. For example, in *White* v. *Kimmel*, 193 F.2d 744 (9th Cir. 1952), *cert.den.* 343 U.S. 957 (1952), thirty copies of a written piece were sent to certain individuals with special interest in the material without notice of copyright and without forfeiture resulting. If there were a distribution by psychiatrist Moore to his patients, it was precisely like the limited publication in *Schellberg* v. *Empringham*, 36 F.2d 991 (S.D.N.Y. 1929), where a doctor distributed a large number of notice-free reprints of one of his articles to patients and physicians. In *Hirshon* v. *United Artists Corporation*, 243 F.2d 640 (D.C. Cir. 1957), 2,000 copies of songs properly were sent notice-free to radio stations.

Here the court of appeals held that the trial court could have properly made a determination that there was a "distribution" of *Desiderata* in Denver (App.B, *infra*, p. 26a). Neither court held that a general publication occurred in Denver and neither court could. All that is known is that Major Moore distributed in Denver at least three and at most a limited number (a "package") of autographed copies of *Desiderata* to his patients (App. A, *infra*, p. 9a).

For an improper publication to cause a forfeiture, that publication also must be "authorized" by the copyright owner. 17 U.S.C. 10; *American Tobacco, supra.* Moore requested and Ehrmann granted permission to use *Desi-*

derata in Moore's work overseas only *after* Moore made the Denver distribution.[3]

Even if there were no notice of copyright on the Denver copies, no forfeiture occurred because it was not a general publication and because it was not authorized by Ehrmann.

2. United Dictionary v. Merriam is controlling here.

In *United Dictionary Co.* v. *Merriam Co., supra,* this Court held[4] that the statute requiring a copyright notice, and by implication "punishing a false notice,"

> "does not require notice of the American copyright on books published abroad and sold only for use there . . . ." *Id.,* at 266.

Even though this rule has been acknowledged in *Heim* v. *Universal Picture Co., Inc., et al.,* 154 F.2d 480, at n.6 (2nd Cir. 1946), and until now has not been questioned, the court of appeals doubted that that is what 17 U.S.C. 10 means (App.B, *infra,* p. 26a). The issue is important because the only authorized distribution by Moore was "over-

[3] Moore's October 5, 1942 letter tells of the recent Denver distribution and asks for "overseas" permission. Ehrmann's November 3, 1942 letter gives overseas permission (App.A, *infra,* p. 9a). Authorization was not given or requested prior to the October 5, 1942 letter. Copies of the full letters appear at pp. 23-32 of plaintiff's short appendix in the court of appeals.

[4] "The question is whether the omission of notice of the American copyright from the English publication, with the assent of the appellee, destroyed its rights, or, in other words, whether the requirement . . . that notice shall be inserted 'in the several copies of every edition published' extends to publications abroad." 208 U.S. at 263-264. The Court was construing a provision in the copyright Act of June 18, 1874, c. 301, §1, that is the same as Section 10 except that Section 10 by its terms limits its effect to publications within the United States.

seas" in the Pacific beyond the United States' then existing borders.

Section 10 of Title 17, U.S.C., provides in pertinent part:

> ". . . such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor . . . ."

There is no statutory requirement that the American or any other copyright notice appear on a foreign publication of an American copyrighted work. The leading commentator on copyright law summarizes the law thusly:

> "Although the necessity of a notice on works first published abroad remains subject to dispute it seems clear that if a work is first published within the United States with the proper copyright notice thereon copyright having been thereby obtained, it may thereafter be published abroad without any such notice." *Nimmer on Copyright,* §89.42, pp. 337, 338.

Notwithstanding the weight of this authority, it is the alleged breach of Section 10 that was the predicate for the district court's forfeiture determination (App.A, *infra,* p. 15a), and the court of appeals affirmance (App.B, *infra,* p. 26a).

C. An Important Issue of Federal Law Should Be Settled by This Court.

Section 8, Title 17, U.S.C., provides that the republication by the government, "either separately or in a public document," of copyrighted material cannot cause the forfeiture of the underlying copyright.[5] According to the

[5] The second paragraph of Section 8, which contains the provision referred to in the text, has been utilized in *Time, Incorporated* v. *Bernard Geis Associates,* 293 F. Supp. 130 (S.D.N.Y. 1968), and *Marvin Worth Produc-*

court of appeals, "by the Government, either separately or in a public document" refers only to important official pronouncements originating from high government authority (App.B, *infra,* pp. 24a-25a), and, therefore, Section 8 is not applicable here.

The issue is an important one,[5] and the court of appeals' analysis is wrong for three reasons: (1) it offends the basic copyright maxim of this Court that all works are equal for purposes of copyright law; (2) it establishes a restrictive test impossible to apply, yet without any countervailing systemic value; (3) it chills the willingness of private citizens to permit the use of their copyrighted works in government endeavors.

In *Bleistein* v. *Donaldson Lithographing Co.,* 188 U.S. 239, 251-252 (1903), Mr. Justice Holmes speaking for this Court cautioned:

> "It would be a dangerous undertaking for persons trained only to the law to constitute themselves judges of the worth of pictorial illustration, outside of the narrowest and most obvious limits. At one extreme, some works of genius would be sure to miss appreciation. . . . At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the

[5] (Continued)
tions v. *Superior Films Corp.,* 319 F.Supp. 1269 (S.D.N.Y. 1970). In both cases, as here, previously copyrighted material was used by the government without attending to copyright formalities. In neither case was there ever a real issue whether the use was "by the Government," within the meaning of Section 8.

[6] Whether it be in *The Congressional Record* or in photostated handouts at Annapolis, the government publishes thousands of copyrighted works a year. The court of appeals below jeopardizes the validity of each of those copyrights by its decision below.

> interest of the public, they have a commercial value—it would be bold to say they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change. That these pictures had their worth and their success is sufficiently shown by the desire to reproduce them without regard to the plaintiff's rights."

When the court of appeals decided that *Desiderata* "was not nearly comparable in its significance to the governmental interest in the use" of the Abraham Zapruder film[7] of the John Kennedy assassination (App.B, *infra,* p. 25a), it offended this time honored rule, even though perhaps unintentionally, as clearly as if it had cited *Bleistein* as being in opposition. The treading by the court of appeals on Mr. Justice Holmes' warning cannot be explained by emphasizing the use of the work rather than the work itself. A person will judge the importance of the use in part at least by the importance of the work. A trivial poster used to sell war bonds will generally be considered a trivial use nonetheless, even though no one disparages the selling of war bonds. Surely we would not call psychiatric treatment of combat soldiers trivial, yet that is what the court of appeals did if it is really the use rather than the copyrighted work of which it was requiring significance.

The second disadvantage of the court of appeals' test is that it employs sliding scales of significance and executive hierarchy without any clear guide as to when the

[7] The court of appeals had to try distinguishing *Desiderata* from the use of the Zapruder film because the latter was freely acknowledged to have been used "by the Government, either separately or in a public document" in *Time, Incorporated* v. *Bernard Geis Associates, supra.*

lines have been crossed. The test proposed by your petitioner is, was the copyrighted material published by a government employee in furtherance of his government duties or responsibilities? If the answer is yes, the use falls within the protection of the Section 8 provision in issue. This test sets forth standards that are easily applied; it falls into that large body of master-servant jurisprudence and thus can be analyzed in a well-fixed framework. The test proposed by your petitioner has these further advantages: (i) it is the test adopted by this Court and other courts of appeal in analogous cases; (ii) it acknowledges the fact that it is through *persons* that the government acts; and (iii) it is the test applied by the leading commentator.

Section 8 of Title 17, U.S.C., has two paragraphs. The first paragraph[8] provides that no copyright may exist in materials published by the government; in this context the question has often arisen whether material was created by an employee as part of his duties as an employee or on his free time. The second part of Section 8, the focus here, provides that publication of material by the government will not strip an existing copyright from such material; in this context, your petitioner proposes, the test should likewise be whether the material was used by

[8] "No copyright shall subsist in the original text of any work which is in the public domain, or in any work which was published in this country or any foreign country prior to July 1, 1909, and has not been already copyrighted in the United States, or in any publication of the United States Government, or any reprint, in whole or in part, thereof, except that the United States Postal Service may secure copyright on behalf of the United States in the whole or any part of the publications authorized by section 405 of title 39." 17 U.S.C. 8 (first paragraph).

an employee in furtherance of his government duties. In *Public Affairs Associates, Inc.* v. *Rickover,* 268 F.Supp. 444, 448 (D.D.C. 1967), on remand from 369 U.S. 111 (1962) *rev'g* 284 F.2d 262 (D.C. Cir. 1960), the court held, in considering whether under Section 8 (first paragraph) certain speeches[9] of Admiral Rickover were his or the government's:

> "The fundamental determination in resolving that issue is whether the disputed speeches fall within the purview of Admiral Rickover's official duties . . . ."

In *Sawyer* v. *Crowell Pub. Co.,* 46 F.Supp. 471, 473 (S.D.N.Y. 1942), the court held that a map prepared by the plaintiff-executive assistant to the Secretary of the Interior, although he was not asked to prepare a map, "relates directly to the subject matter of the plaintiff's work," and was therefore, pursuant to Section 8, not copyrightable.

The philosophy of the court of appeals below, evinced by such expressions as that Major Moore's job was "not nearly comparable in its significance" to the work of the famous Warren Commission (App.B, *infra,* p. 25a) and

[9] The court of appeals in that case, in a passage quoted by the court of appeals below, previously determined that the issue was whether the speeches were "authorized expositions on matters of governmental interest by governmental authority." 284 F.2d at 268. That court rejected the plaintiff's argument that the test was whether the speeches "resulted from his official responsibilities." *Id.* at 267. This Court then reversed on the basis that the record was too sparse for the lower court to have issued a declaratory judgment. The speech that was the focus of these cases was a speech on education given to a private club in New York City while the Admiral was off-duty. The district court that ultimately decided the case held that this activity was not undertaken in furtherance of his government responsibilities.

that "governmental" "interest" in the Major's distribution was negligible (*id.*), runs counter to the philosophy of this Court as expressed in *Barr* v. *Mateo*, 360 U.S. 564 (1954).[10] In the context of whether an employee's acts were sufficiently those of the government so as to permit invocation of immunity, this Court concluded, at 573:

> "The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy."

Major Moore was employed by the government to treat the psychiatric health of soldiers, as he treated the psychiatric health of private citizens before. His duty was to treat the war damage done to the non-physical part of men. One of the ways this psychiatrist found useful was to administer to some of his patients the "medicine" (App.A, *infra*, p. 10a) of *Desiderata*—"it cures everything" (*id.*). Defendant is bound by Major Moore's statement that it was *in his work* that he used *Desiderata* (*id.*).

Quoting the test employed by the leading commentator on copyrights, a commentator cited by both courts below on other issues, the *Desiderata* copyright was not forfeited during World War II because the work was used "by a governmental officer or employee as a part of his duties or within the scope of his employment." *Nimmer on Copyrights*, §66.

Perhaps the most compelling reason for rejection of the court of appeals' formula, as opposed to your petitioner's,

[10] *See also, Gravel* v. *United States*, 408 U.S. 606, 612 (1972).

is that the former produces no beneficial effect. What public value or benefit is promoted by limiting the class of government publications that do not cause a forfeiture? That formulation hurts the people who generously offer[11] their property to assist a government endeavor. It hurts the government's ability to secure copyrighted works for use; not only will procurement be more expensive, but it may be made impossible if the result were to be forfeiture of all rights because of the inapplicability of the second paragraph of Section 8.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 1976.

[11] The statutory provision was expressly created for those who give prior consent to government publication. House Report No. 2222 and Senate Report No. 1108, 60th Cong., 2d Sess. (1909).

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROBERT L. BELL, d/b/a CRESCENDO PUBLISHING COMPANY,
Plaintiff,
v.
COMBINED REGISTRY COMPANY, an Illinois corporation,
Defendant.

No. 72 C 1819

MEMORANDUM OPINION

(Filed July 14, 1975)

JOEL M. FLAUM, *District Judge*:

This is an action for copyright infringement arising out of the publication of a poem[1] (herein referred to as "Desiderata") by defendant in the August, 1971, issue of *Success Unlimited Magazine*. The case has been submitted to the Court for decision on affidavits, depositions, exhibits, and memoranda. The following shall constitute the findings of fact and conclusions of law.

THE ISSUES

Plaintiff alleges that the poem (originally untitled) was written by Max Ehrman in Terre Haute, Indiana, in the early 1920s; Mr. Ehrman obtained a federal copyright (No. 962402) on the poem on January 3, 1927 under the name of "Indiana Publishing Company"; Mr. Ehrman bequeathed the copyright to his widow Bertha upon his death in 1945; Bertha Ehrman renewed the copyright in 1954; Bertha Ehrman bequeathed the copyright to her nephew Richmond Wight upon her death in 1962; Richmond Wight assigned the copyright for

[1] The full text of the work is set out as an Appendix.

value to plaintiff in 1971. Plaintiff also claims that in 1948 Bertha Ehrman copyrighted a book entitled The Poems Of Max Ehrman (copyright No. A28266) which included Desiderata; Bertha Ehrman assigned this copyright in the same year to Bruce Humphreys Inc. for value; in 1968 an assignment was made by the above assignee to plaintiff. Plaintiff claims that the copyrights are valid and have been infringed by defendant. He cites *Bell* v. *Pro Arts Inc.*, 366 F.Supp. 474 (N.D. Ohio 1973), aff'd 511 F. 2d 451 (6th Cir. 1975), in which his ownership and the validity of the instant copyrights were upheld.

Defendant raises a number of issues and defenses. It claims that Max Ehrman violated the Indiana statute on fictitious names when he applied for the copyright; that the legacy from Bertha Ehrman to Richmond Wight did not include the copyright; that Max Ehrman authorized the publication of the poem without the required copyright notice; that an improper notice was used prior to the recordation of the assignment; that plaintiff authorized publication of the poem without the required copyright notice; that the copyrights were abandoned by Max Ehrman and by plaintiff; that plaintiff is estopped from asserting the copyrights; and that plaintiff is guilty of laches.

Defendant has counterclaimed for the fair value of a retraction which it printed which included an advertisement for the poem.

EFFECT OF PRIOR LITIGATION

At the outset the effect of prior litigation over the instant copyrights must be delineated. In *Bell* v. *Pro Arts Inc.*, 366 F.Supp. 474 (N.D. Ohio 1973), aff'd 511 F.2d 451 (6th Cir. 1975), plaintiff's ownership and the validity of the copyrights were upheld. In *Blonder-Tongue* v. *U. of Illinois Foundation*, 402 U.S. 313, 91A S.Ct. 1434 (1971), the Supreme Court ruled that a prior judicial finding of a patent's invalidity estops the patentee (who was plaintiff in the prior action) from reasserting

the patent's validity in a subsequent infringement suit.[2] The Court also noted that due process prohibited applying a collateral estoppel to one who never appeared in the earlier litigation. Applied to the instant case, *Blonder-Tongue* is no bar to defendant's efforts to demonstrate that the copyrights upheld in *Pro Arts* are invalid. See *Boutell* v. *Bolk*, 449 F.2d 673, 678 (10th Cir. 1971). *Pro Arts*, of course, does have weight as precedent. In this connection it should be noted that the issues of prior publication without notice and of abandonment were never raised or passed on by the court in *Pro Arts*.

BURDEN OF PROOF

To prevail on his claim of copyright infringement plaintiff must show (1) ownership of the copyright and (2) copying by the defendant. The corporate defendant in the instant case does not dispute the fact that it published the poem Desiderata in the August, 1971, issue of Success Unlimited Magazine. A copying issue is not present in this case. Ownership includes such elements as originality, copyrightability, citizenship, compliance with statutory formalities (registration, notice, etc.), and a chain of title reaching to the plaintiff. See *Nimmer on Copyrights* §141.1.

The copyright act provides that the certificate of registration ". . . shall be admitted in any court as prima facie evidence of the facts stated therein." 17 U.S.C. Section 209. There is authority in this Circuit that the certificate constitutes prima facie evidence not only of the "facts stated therein" but also of the overall validity of the copyright. *Wihtol* v. *Wells*, 231 F.2d 550, 553 (7th Cir. 1956). In *Nimmer on Copyrights* Section 141.1, p. 612, however, the author states:

> ". . . the only evidence required of the plaintiff to establish prima facie ownership in addition to the

[2] It estops him unless he can demonstrate that he did not have a Full and Fair opportunity to litigate the validity issue in the prior suit.

registration certificate is evidence of the proper affixation of the copyright notice on published copies of the work, and of plaintiff's chain of title from the original claimant."

In the instant case plaintiff does seek to establish his chain of title to the copyrights, whereas the notice issue is raised by the defendant. This is not the typical case in which the presence or absence of the copyright notice on prior publications is a matter uniquely within the knowledge of the plaintiff. In view of *Wihtol, supra,* and the apparent understanding of the parties, the court will treat the notice issue as a potential affirmative defense subject to rebuttal by the plaintiff. Thus to make out a prima facie case of ownership of the copyrights, plaintiff must show a registration certificate and a chain of title to him.

PLAINTIFF'S CHAIN OF TITLE

Defendant raises two issues in an attempt to show that plaintiff is not the proprieter of the copyrights in issue. For the reasons stated below, the Court agrees with the holding in *Pro Arts, supra.,* that plaintiff has sustained his burden of proof on this issue.

As outlined above, plaintiff has submitted the following evidence to show his title to the copyrights:

(1) A certified copy of the certificate of registration of copyright No. 962402; dated January 3, 1927; listing as author of a prose piece beginning "Go placidly. . ." Max Ehrman, and naming as proprietor the Indiana Publishing Company.

(2) Defendant's admission that Indiana Publishing Company was the name under which Max Ehrman did business.

(3) The will of Max Ehrman; defendant's admission that he left his entire estate to his widow Bertha upon his death in 1945.

(4) A certified copy of Bertha Ehrman's renewal of the copyright in 1954.

(5) Bertha Ehrman's will, by which she makes a specific devise involving the copyright to Richmond Wight, and a residual device to a trust. (The legal consequences of this will are disputed).

(6) A copy of the assignment by Richmond Wight to plaintiff, dated May 14, 1971.

The authenticity of these documents is not challenged. This evidence makes out a prima facie case showing that the original copyright is owned by plaintiff. Clearly copyrights can be assigned or passed by will, 17 U.S.C. Section 28.

Defendant's first contention is that Max Ehrman did not register the name "Indiana Publishing Company" under the applicable Indiana fictitious name statute.[3] Defendant has submitted a certification from the Recorder of Vigo County, Indiana, which states that no such registration was made. This fact is not contested by plaintiff. The legal implication of this omission, defendant argues, is that Max Ehrman did not obtain a valid copyright under the name "Indiana Publishing Company". Defendant relies on *Haas* v. *Leo Feist, Inc.,* 234 F. 105 (S.D.N.Y. 1916). In that case Judge Learned Hand ruled that a copyright taken in the name of a non-existent partnership was invalid because under the law of New York State all acts of such nonentities were void. As a result, the court held, the copyright proprietor could not put the proper notice on its work as required by federal copyright law. 17 U.S.C. Section 18 (now Section 19). Plaintiff argues that the decision of this Circuit in *Leo Feist, Inc.* v. *Young,* 138 F.2d 972 (7th Cir. 1943), repudiates *Haas;* and that no deceptive notice issue is present in the instant case. *Young* held that failure to comply with a Wisconsin statute requiring "music brokers" to register could not defeat a federal copyright registration.

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[3] Ch. 151 §§1-3; Laws of Indiana, Acts of 1909. This statute is now at 10 Burns Ind. Stat. §50-201, et seq.

The Court finds that *Haas* and the failure to comply with the Indiana statute do not operate to invalidate the copyright in Indiana Publishing Company. It is conceded that any copyright notices were under the name of Indiana Publishing Company. Thus the federally-required notice provisions are not affected as they were in *Haas*. The law in this Circuit, embodied in *Young, supra,* is that the operation of state law cannot defeat the validity of a federal copyright. Even if the opposite were true, the Indiana statute did not render void all acts of an unregistered fictitious name; but only those acts which misled a third party. For all of these reasons, the Court finds that the defect in registration under Indiana law does not invalidate the copyright.

Defendant's second contention is that the bequest from Bertha Ehrman to Richmond Wight did not operate to pass the copyright to Wight, but only the income from the copyright. In pertinent part, the will provides:

> I further bequeath to my said nephew, Richmond Wight, all my right, title and interest in and to all royalties and income from the writings, poems, and plays of Max Ehrman, including royalties from individual plays.

The will then establishes a trust for Richmond Wight and provides for income to be paid to him from assets of the trust. Under Indiana law, this will is to be construed consistently with the intent of the testator. *Semmes* v. *Gary National Bank,* 254 Ind. 682, 262 N.E. 2d 529 (1970). The federal courts have exclusive jurisdiction to determine questions of title to a copyright. *Harrington* v. *Mure,* 186 F.Supp. 655 (S.D.N.Y.). The clause of the will in question is susceptible of the interpretation advanced by either party. To evince the intent of the testator, however, the Court must look at the entire will. The testator bequeathed certain assets to a trust, the income of which was to go to Richmond Wight. If, as defendants suggest, the copyright itself went into the trust, then the separate clause bequeathing the copyright income to Wight would be redundant.

The testator must have intended to bequeath the copyright itself by her specific grant. This was the interpretation reached by the trustee of the trust itself, and by the court in *Pro Arts.* Therefore, the court finds that the copyright passed by will from Bertha Ehrman to Richmond Wight in 1962.

Defendant does not contest the validity of the assignment to plaintiff. The Court finds that the assignment was valid. Therefore, the Court concludes that plaintiff is the proprietor of copyright No. 962402.

Defendant does not contest the chain of title or validity of copyright No. A28266. The Court finds that plaintiff has established its validity and his ownership by the certificate of registration, the assignment to Bruce Humphries Inc., and the assignment to plaintiff. The Court concludes that plaintiff is the proprietor of copyright No. A28266.

DEFENDANT'S ATTACKS ON THE COPYRIGHT

Defendant has raised the following issues by way of defense:

> (1) was the copyright forfeited by acts of Max Ehrman in publishing the work without the requisite copyright notice?
>
> (2) was the copyright abandoned by Max Ehrman?
>
> (3) was the copyright forfeited by incorrect notice prior to the assignment to plaintiff?
>
> (4) is the plaintiff estopped from asserting the copyright against defendant?
>
> (5) is the plaintiff guilty of laches?

It is helpful to define the terms forfeiture and abandonment. According to *Nimmer on Copyrights,*

> Despite imprecise usage in some of the cases, abandonment must be distinguished from forfeiture of copyright. The latter occurs upon publication of the work without proper copyright notice and is effec-

> tuated by operation of law regardless of the intent of the copyright proprietor. Abandonment occurs only if there is an intent by the copyright proprietor to surrender rights in his work.
>
> *Id.* at Section 146, p. 656.6

Thus forfeiture presents a narrower technical question; abandonment is a more subjective determination.

THE FACTS

This case turns upon a reconstruction of events of many years ago. Some of the proof submitted by defendant consists of letters and newspaper articles from the 1930s and 1940s. This material is hearsay, for it is offered in an attempt to reconstruct the facts related in them. The court finds that these materials nevertheless are admissible under the "ancient documents" exception to the hearsay rule. As embodied in the Federal Rules of Evidence (effective July 1, 1975), the rule excepts from operation of the hearsay rule:

> Statements in a document in existence twenty years or more the authenticity of which is established.
>
> Rule 803(16)

It is fair to assume that the material offered by defendant is the best evidence available on the issues present. Insofar as plaintiff's objections go to the weight of the exhibits, they have been considered as the documents are evaluated.

As to the issues raised by the defendant, the court finds the following facts.

Mr. Max Ehrman was the author of the work now known as Desiderata. His diary states that the poem had its early formation in 1921. As he stated therein:

> I should like, if I could, to leave a humble gift . . .: a bit of chaste prose that had caught up some noble moods.

In 1927 he copyrighted the work under his business name—Indiana Publishing Company. In December of 1933, Mr. Ehrman used Desiderata as part of a Christmas greeting sent to friends. At least two of the recipients wrote back thanking him for the cards. Thereafter Mr. Ehrman received a letter from one Merrill Moore, dated July 20, 1942. Mr. Moore identified himself in the correspondence as a practicing psychiatrist presently on active duty with the U.S. Army. He explained his reasons for writing as follows:

> I think you should know that nearly every day of my life I use your very fine prose poem Desiderata in my work . . . Here I have found your philosophy as useful and have used it considerably as part of the psychotherapy I am doing . . . I must have given away a thousand copies in the last few years. A patient, a depressed woman, gave it to me once several years ago, with no name attached . . .

Thereafter, several letters were exchanged between the men regarding Moore's use of the poem. On August 17, 1942, a Mr. Fuller wrote to Moore stating that a package containing autographed copies of the work had been sent a month earlier per Moore's request. By letter of October 5, 1942, Moore thanked Ehrman for the copies he had received and made the following statement:

> . . . I have distributed the beautiful copies which you sent me and want to thank you for them again. I know that I shall carry Desiderata with me and when I get there I shall have it multigraphed for distribution to the soldiers if you have no objection . . .

Ehrman responded to this letter on November 3, 1942:

> Yes, of course, you may distribute multigraphed copies of Desiderata to the soldiers. I am happy to have at least this small part in your splendid work.

Additional correspondence from Moore to Ehrman dated Thanksgiving and November, 1944, stated:

> Also I use Desiderata liberally and always find it helpful. Like a panacea (it cures *everything*) it should be bottled and sold as Dr. Ehrmann's Majic Soul Medicine!!!
>
> and
>
> I am continuing to use your priceless prose poem in my work.

Several publications of that time carried stories of Moore's work and his use of Desiderata, see *Saturday Spectator*, "A Poet's Influence", December 15, 1945; *A.A.A.S. Bulletin*, "From the Netherlands East Indies", October, 1945; *DePauw Alumnus*, "Nationally Known Poet and Author Dies", Vol. X, November 1945.

Found in the Merrill Moore papers in the Library of Congress is a typed copy of Desiderata with the author's name under the title but no copyright notice.

The next chapter of this saga takes place in the 1950s. Sometime between September 1, 1952, and 1956 the Reverend Frederick Kates, serving as the dean of St. John's Cathedral in Spokane, Washington, came across a copy of Desiderata without a copyright notice. On June 1, 1956, Rev. Kates became rector of St. Paul's Church, Baltimore. This church had been founded in 1692. In 1957 Rev. Kates included the poem in the first edition of his book, *Between Dark and Dawn*, (The Upper Room 1957). During the lenten season of either 1959 or 1960 Rev. Kates included the poem on a sheet of devotional material he passed out to about 200 members of his congregation. At the top of the page of this handout containing the poem was the notation:

> "Old St. Paul's Church, Baltimore, A.D. 1692."

Reverend Kates also passed out copies of Desiderata at various other times until 1972. Seven editions of his book included the poem. In 1972 he was informed by his publisher that a copyright claim had been asserted.

Both parties agree that a great number of periodicals and commercial firms used Desiderata with the attribution "Old St. Paul's Church, Baltimore, A.D. 1692". The above was the source of such erroneous attribution.

In March of 1967 defendant published the poem in *Success Unlimited Magazine* with this attribution. Mr. Mandino, the officer of defendant in charge of content of the magazine, had received the poem from Father John O'Brien of the University of Notre Dame. Mr. Mandino then saw the poem in Equinox, its publisher stated that he had found the poem in India and that it had no known author. The poem was published again in the August 1971 edition of *Success Unlimited*. This suit was instituted based on this publication.

FORFEITURE ISSUES

The copyright notice is required on material sought to be protected by the Copyright Act, see 17 U.S.C. §10. A publication authorized on the copyright proprietor which fails to include the correct notice of copyright forfeits the copyright protection and places the material into the public domain. *Nimmer, supra*, §82. Thus a proprietor who desires to preserve his legal monopoly must be vigilant in policing distributions of the work.

To produce a forfeiture of the copyright, the evidence must show: (1) that the poem was published, (2) that no correct notice appeared thereon.[4] According to *Nimmer, supra*,

> . . . publication occurs when by consent of the copyright, the original or tangible copies of a work are sold, leased, loaned, given away, or otherwise made available to the general public . . .
>
> *Id.* §49 p. 194-195.

Defendant cites several instances which, it argues, produced a forfeiture of the Desiderata copyright. The most substantial of these instances, in the court's view, was the distribution of copies of the poem to U.S. troops in

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[4] The act does excuse certain accidental omissions of the notice, see 17 U.S.C. §20.

the Pacific by Merrill Moore during World War II. There can be no serious dispute that this distribution was a "publication" as defined by *Nimmer, supra.* By letter Max Ehrman expressly authorized the distribution, and copies of the work were distributed to many hundreds of men. What is critical is this factual issue: did the copies distributed by Merrill Moore include the required copyright notice. There is no direct evidence on this question. However, it is a fair inference that the distribution of the work through Merrill Moore was accomplished without the requisite copyright notice. All of the circumstances are consistent with such a conclusion, and inconsistent with a contrary one. The ambience of the exchange of letters between the two men was one of informality and cordiality. Permission to use the work was given gratuitously. Nowhere was a copyright or copyright notice mentioned. The lone copy of the poem found in the Merrill Moore papers did not have such a notice. Nor did the copy that Rev. Kates found some years later. The actions of Max Ehrman are not consonant with those of a copyright proprieter intent on protecting a commercial asset. Defendants have met the burden of showing that a forfeiture was more likely than not.

In the face of defendant's showing on the forfeiture issue, plaintiff has offered no evidence in rebuttal. A copyright owner has the duty to police all distributions of his work if he desires to preserve his legal monopoly. Indeed, most courts have imposed the burden of proof on the copyright proprietor in the first instance to demonstrate that he has placed the notice on all published copies. Defendant in the case at bar has established prima facie that a forfeiture took place. Plaintiff could definitively resolve the issue by producing a copy of the work which was distributed to the troops. It is not unreasonable to place upon a copyright proprietor this ultimate burden. An owner who desires to protect his copyright ordinarily preserves copies of all publications so that proof of notice is always available. Thus the inability of the present proprietor to produce a copy showing notice has substantive significance. In view of the evidence submitted by defendant, and the absence of any rebuttal by plaintiff, the court concludes that a forfeiture has been established by a preponderance of the evidence.

This finding that a forfeiture occurred during World War II means that the poem entered the public domain, and no valid copyright may now be asserted.

Defendant also contends that the work was forfeited when published in newspapers, and when plaintiff used his own name on a flyer sent to accused infringers. The evidence on these two issues is not, in the court's view, sufficient to show a forfeiture.

ABANDONMENT ISSUES

Abandonment of a copyright occurs if the owner intends to give up his copyright protection. Some overt act is necessary to evidence such an intent, *National Comics* v. *Fawcett Pub.*, 191 F.2d 594 (2d Cir. 1951), mere inaction is not enough, *Hampton* v. *Paramount Pictures,* 279 F.2d 100 (9th Cir. 1960). The presence of a notice is strong evidence of an intent not to abandon, *Stuff* v. *E. C. Pub.*, 342 F.2d 143 (2d Cir. 1965). A limited distribution, even if not widespread enough to effect a forfeiture, can, coupled with the requisite intent, cause an abandonment.

On the basis of the facts outlined above, the court finds that Max Ehrman abandoned his copyright protection. The acts of sending out Christmas cards and authorizing Moore's distribution certainly are strong evidence that the author did not endeavor to protect a commercial property. Even in his diary, the author opines that he has left a "gift" to the world.

OTHER ISSUES

Defenses of estoppel and laches have been raised by defendant. The court is of the opinion that the evidence fails to support either contention.

Defendant has counterclaimed for the fair value of a retraction which it printed at plaintiff's behest which included an advertisement for the poem. The court finds that this undertaking cannot be the basis for quasi-contractual liability. There is no evidence that defendant ever contemplated being reimbursed for this expenditure. At the time both parties apparently were proceeding under the assumption that the copyright in question was valid.

Therefore, judgment is entered for plaintiff on defendant's counterclaim.

CONCLUSION AND JUDGMENT

In conclusion, the court finds that the author and copyright proprietor, Max Ehrman, both abandoned and forfeited the copyright in Desiderata. This conclusion follows from the history of his actions regarding the work; a history wanting in the vigilance required by one who seeks to maintain the protection of the federal copyright law.

For the foregoing reasons, judgment is entered for the defendant, Combined Registry Company.

Dated July 14, 1975

/s/ Joel M. Flaum
United States District Judge

APPENDIX

Go placidly amid the noise and the haste, and remember what peace there may be in silence. As far as possible, without surrender, be on good terms with all persons. Speak your truth quietly and clearly; and listen to others, even to the dull and the ignorant; they too have their story. Avoid loud and aggressive persons; they are vexatious to the spirit. If you compare yourself with others, you may become vain or bitter, for always there will be greater and lesser persons than yourself. Enjoy your achievements as well as your plans. Keep interested in your own career, however humble; it is a real possession

in the changing fortunes of time. Exercise caution in your business affairs, for the world is full of trickery. But let this not blind you to what virtue there is; many persons strive for high ideals, and everywhere life is full of heroism. Be yourself. Especially do not feign affection. Neither be cynical about love; for in the face of all aridity and disenchantment, it is as perennial as the grass. Take kindly the counsel of the years, gracefully surrendering the things of youth. Nurture strength of spirit to shield you in sudden misfortune. But do not distress yourself with dark imaginings. Many fears are born of fatigue and loneliness. Beyond a wholesome discipline, be gentle with yourself. You are a child of the universe no less than the trees and the stars; you have a right to be here. And whether or not it is clear to you, no doubt the universe is unfolding as it should. Therefore be at peace with God, whatever you conceive Him to be. And whatever your labors and aspirations, in the noisy confusion of life, keep peace in your soul. With all its sham, drudgery and broken dreams, it is still a beautiful world. Be cheerful. Strive to be happy.

APPENDIX B

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 75-1753

ROBERT L. BELL, d/b/a CRESCENDO PUBLISHING COMPANY,
Plaintiff-Appellant,

v.

COMBINED REGISTRY COMPANY, an Illinois Corporation,
Defendant-Appellee.

ARGUED FEBRUARY 17, 1976 — DECIDED MAY 14, 1976

Before FAIRCHILD, *Chief Judge*, CUMMINGS and PELL, *Circuit Judges.*

FAIRCHILD, *Chief Judge.* Appellant Robert L. Bell, as proprietor of the federal copyright in a prose piece entitled *Desiderata*, brought an action in the district court and alleged copyright infringement by the appellee Combined Registry Company in its unauthorized publication of *Desiderata* in its August, 1971 issue of *Success Unlimited* magazine. The district court held that appellee successfully asserted defenses of forfeiture and abandonment of the copyright.

For the reasons stated herein, we affirm.

I

Statement of Facts

The facts in this matter are fully set forth in the District Court's opinion,[1] and are only summarized here.

[1] *Bell* v. *Combined Registry Company*, 397 F.Supp. 1241 (N.D. Ill. 1975).

Hoosier poet Max Ehrmann is the undisputed author of the prose poem *Desiderata.* In 1927, he obtained a federal copyright in the work. At Christmas time of 1933, Ehrmann sent out Christmas cards including the text of *Desiderata.* The record contains no copy, nor other evidence to show whether a copyright notice appeared thereon.

The next episode concerning *Desiderata,* and the one upon which the district court based its finding of forfeiture, is related in the correspondence between Ehrmann and one Merrill Moore, a United States Army psychiatrist during World War II. Moore first wrote to Ehrmann in 1942 from Denver and indicated that he had distributed an estimated 1,000 copies of *Desiderata* over the years while in civilian practice in Boston. Their letters reveal that Moore requested and received permission from Ehrmann to distribute *Desiderata* to the soldiers as part of his treatment. In November of 1944, Moore twice wrote to Ehrmann from the South Pacific and stated that he continued to use the prose poem in his work.

Ehrmann died September 9, 1945. In late 1945, reports of the Ehrmann-Moore correspondence appeared in several publications, each of which set out *Desiderata* without copyright notice. Additionally, a copy of the poem bearing no copyright notice was found in Moore's papers in his Library of Congress file.

In 1957, one Reverend Kates included a copy of *Desiderata* without copyright notice, in his book, *Between Dawn and Dark.* It was not until 1972 that his publisher notified him that *Desiderata* was under copyright. Reverend Kates also deposed that over the years he had distributed a substantial number of copies of *Desiderata* to his parishioners, and specifically recalled dispensing about 200 copies at a Lenten Service in 1959 or 1960 while he was at St. Paul's Church in Baltimore, Maryland. During the 1960's and early 1970's, a great number of periodicals printed *Desiderata,* and many firms distributed wall posters of the work, with the erroneous attribution "Found in Old St. Paul's Church, Baltimore, Dated 1692."

Reverend Kates' use of *Desiderata* is the apparent source of this widespread erroneous attribution of the work to St. Paul's Church, which was founded in 1692.

II

Use of New Rules of Evidence

Appellant Bell's first assignment of error concerns the propriety of the district court's use of the new Federal Rules of Evidence (hereinafter "Rules") which became effective July 1, 1975.[2] The appellant questions the use of the new Rules in the context of the district court's admission of fifteen documents for their truth under new Rule 803(16).[3] That rule pertains to the admission of ancient documents and excerpts from the operation of the hearsay rule, "(s)tatements in a document in existence twenty years or more the authenticity of which is established." Most of the documents to which appellant objects are the letters comprising the Max Ehrmann-Merrill Moore correspondence during World War II and some periodicals reporting that correspondence.[4]

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[2] Public Law 93-585,93rd Congress.

[3] Insofar as the letters are used to show Ehrmann's consent to Moore's use of *Desiderata*, the letters are not admitted for the truth of the matter stated therein and therefore are not objectionable as hearsay evidence. However, to the extent the letters and other documents are used to prove the fact of distribution of copies of *Desiderata*, and to support the inference that they bore no notice, the letters are potentially excludable as hearsay, unless they fall within an exception to the rule against hearsay.

[4] Appellant objects to the admission of the following documents:

1. Letter, dated July 20, 1942, from Moore to Ehrmann.
2. Letter, dated August 17, 1942, from Fuller to Moore.
3. Letter, dated October 5, 1942, from Moore to Ehrmann.

Preliminarily, we note that this matter did not proceed as a conventional trial. On November 12, 1974, the parties entered into a stipulation as to the authenticity of the various exhibits, including those challenged here. By January of 1975, the parties had submitted their documentary evidence as well as three sets of briefs for the district court's consideration. The record reveals that oral arguments regarding the stipulations and briefs were scheduled for May 20, 1975 before District Judge Flaum. However, as appellant has failed to supply this Court with a transcript of that proceeding, we must look to the briefs and stipulations of the parties for any evidentiary objections.

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[4] (Continued)

4. Envelope postmarked October 6, 1942, and addressed to Ehrmann from Moore.
5. Letter, dated November 3, 1942, from Ehrmann to Moore.
6. Letter, dated November, 1944, from Moore to Ehrmann.
7. Letter, dated Thanksgiving, 1944, from Moore to Ehrmann.
8. Envelope postmarked January 26, 1945, addressed to Indiana Publishing Company, with return address of 51 Northwest First Street, Miami 32, Florida.
9. Publication of *A.A.A.S. Bulletin*, Vol. 4, October, 1945, No. 10.
10. Article entitled "Nationally Known Poet and Author Dies" from *DePauw Alumnus*, Vol. X, November 1945, No. 2.
11. Article entitled "A Poet's Influence" from *Saturday Spectator*, dated December 15, 1945.
12. Letter, dated January 13, 1934, from Worth M. Tippey to Ehrmann.
13. Letter, dated January 10, 1934, from Halsted L. Ritter to Ehrmann.
14. Letter, dated December 21, 1973, to Mr. Goldstein from Roy P. Basler.
15. Copy of *Desiderata* reproduced from the collections of the manuscript division, Library of Congress.

It is appellant's contention that the district court erred in applying the new Rules in that both parties had submitted their evidentiary materials, briefs and stipulations by January of 1975, well in advance of the effective date of the new Rules. Appellee contends that appellant has waived any objection to the use of these Rules by failing to make an objection below. We agree.

Nowhere in the record does it appear that appellant objected to these documents as inadmissible hearsay. While it is true that the parties entered into a stipulation regarding the authenticity of these documents, and thereby effectively reserved objections on other grounds, nowhere does it appear that appellant in fact interposed an objection to consideration of these documents for any purpose.

Even if appellant had properly preserved his objection, we would not feel compelled to find that the district court's use of the new Federal Rules of Evidence constituted error. Since 1971, this court has urged that the proposed rules "be used by the district courts as guidelines and at least given consideration in the exercise of their discretion in making evidentiary rulings." *United States* v. *McCarthy*, 445 F.2d 587, 591 (7th Cir. 1971), recently cited with approval by this court in *United States* v. *Senak*, 527 F.2d 129 (7th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3543 (U.S., March 30, 1976) and in *United States* v. *Craig*, 528 F.2d 773 (7th Cir. 1976).

Additionally, we note that the enacting clause of the new Federal Rules of Evidence states:

> The following rules shall take effect on the one hundred and eightieth day beginning after the date of the enactment of this Act. These rules apply to actions, cases and proceedings brought after the rules take effect. These rules also apply to further procedure in actions, cases and proceedings then pending, except to the extent that application of the rules would not be feasible, or would work injustice, in which event former evidentiary principles apply.

The new Rules were in effect on July 16, 1975, the date of the district's entry of judgment for defendant-appellee; thus, the case was pending within the meaning of the enacting clause. The use of the new Rule certainly was feasible particularly in the context of the informal format of the proceedings below, and we fail to see what injustice would inure to the appellant. Appellant claims that he had no notice of the use of the new Rule and argues that under former Rule 43(a) of the Federal Rules of Civil Procedure, the court was obligated to exclude evidence excludable under Illinois law. There is support for appellant's position that under Illinois law the 30-year ancient documents rule cannot be invoked "except to relieve a party from the burden, otherwise imposed, of proving the due execution of the instrument," that is, solely for purposes of authenticating ancient documents. *Koch* v. *Streuter*, 232 Ill. 594, 603 (1908). Even so, we note that Rule 43(a), F.R.Civ.P., before it was amended to reflect the new Rules of Evidence, stated that the rule favoring reception of evidence governs. It has been held that federal courts are not bound by a state exclusionary rule, *International U., U. Brewery, etc., Wkrs.* v. *Duke & Co., Inc.*, 373 F.Supp. 778 (W.D.Pa. 1974), *aff'd without opinion*, 510 F.2d 969 (3rd Cir. 1975) and *Baylor* v. *Mading-Dugan Drug Company*, 57 F.R.D. 509 (N.D. Ill. 1972).

III

Forfeiture of the Copyright

Appellant's main substantive attack is upon the district court's findings that Ehrmann's actions regarding *Desiderata* resulted in both forfeiture and abandonment of his copyright protection in the work. We deal first with appellant's dispute with the finding of forfeiture.

The Copyright Act requires copyright notice on material sought to be protected. 17 U.S.C. §10. The district court correctly stated the elements of forfeiture as a general publication authorized by the copyright proprietor without the correct notice appearing thereon. *Nimmer on Copyrights*, Section 82.

The district court cited the Ehrmann-Moore correspondence as one instance of the copyright proprietor's use of *Desiderata* supporting forfeiture of copyright protection. In our view, the Ehrmann-Moore correspondence represents the only such instance in the record capable of supporting a finding of forfeiture. The 1933 Christmas cards were not a general publication capable of divesting copyrights in the work. And, neither the publications of *Desiderata* by Reverend Kates nor those that appeared in various periodicals were shown to have been authorized by the copyright proprietor.

The correspondence between Ehrmann and Moore does supply direct credible evidence of a general publication authorized by the copyright proprietor. In fact, the evidence reveals two authorized distributions of *Desiderata* by Moore: one in Denver in 1942, as revealed by Moore's November 3, 1942 letter to Ehrmann; the other in the South Pacific, as confirmed by Moore's letters of November, 1944.

While it is true that there is no direct evidence to establish that those copies distributed by Moore to soldiers bore no copyright notice, we think that the evidence viewed as a whole supports such an inference. The district court reported that the following considerations comprised the factual underpinnings for the inference that Moore distributed copies of *Desiderata* without the requisite copyright notice:

> The ambience of the exchange of letters between the two men was one of informality and cordiality. Permission to use the work was given gratuitously. Nowhere was a copyright or copyright notice mentioned. The lone copy of the poem found in the Merrill Moore papers did not have such a notice. Nor did the copy that Reverend Kates found some years later. 397 F. Supp. 1241 at 1248.

The inference of no notice appearing on the copies distributed by Moore is a fair one; we cannot say that such a finding is clearly erroneous.

A. *17 U.S.C. Section 8*

Appellant has belatedly raised on appeal the alternative argument that even if no copyright notice appeared on the copies distributed by Moore, no forfeiture occurred because that distribution by Moore was a publication by the Government. Appellant relies on the second paragraph of Section 8, Title 17, U.S.C., which reads:

> The publication or republication by the Government, either separately or in a public document, of any material in which copyright is subsisting shall not be taken to cause any abridgement or annulment of the copyright or to authorize any use or appropriation of such copyright material without the consent of the copyright proprietor.

Diligent research has produced only two cases alluding to the second paragraph of 17 U.S.C., Section 8. Neither of those cases presented an issue of whether the publication was "by the Government." In *Time, Incorporated* v. *Bernard Geis Associates,* 293 F.Supp. 130 (S.D.N.Y. 1968), the publication "by the Government" was the Warren Report, the product of a special commission appointed by President Johnson to investigate the killing of President Kennedy. The Warren Report was printed by the Government Printing Office and offered for sale to the public. The copyrighted material involved was Abraham Zapruder's film of the assassination, evidence which was essential to the task of the commission. A member of the commission described the film as "one of the most important pieces of evidence to come before the . . . Commission." *Time, Incorporated, supra,* p. 134.

In *Marvin Worth Productions* v. *Superior Films Corp.,* 319 F.Supp. 1269 (S.D.N.Y. 1970), the alleged publications "by the Government" were the publicly accessible transcripts and opinions in the criminal prosecutions brought against comedian Lenny Bruce. There can be no question that those publications were "by the Government."

Public Affairs Associates, Inc. v. *Rickover,* 284 F.2d 262 (D.C. Cir. 1960), *vacated on other grounds,* 369 U.S. 111 (1962), *on remand,* 268 F.Supp. 444 (D.D.C. 1967) is entitled to some consideration here in deciding what constitutes a publication "by the Government." While it is true that *Rickover* was concerned with the first rather than the second paragraph of Section 8, Title 17, similar considerations were at play. One of the preliminary questions to be decided was whether certain speeches delivered by Admiral Rickover were "publications of the United States Government" and therefore not copyrightable under the first paragraph of 17 U.S.C., Section 8.[5] The Court of Appeals in *Rickover* stated at 284 F.2d 262, 268, with regard to 17 U.S.C., Section 8:

> The copyright provision should read, we think, to refer to publications commissioned or printed at the cost and direction of the United States. These would be authorized expositions on matters of governmental interest by governmental authority.

On remand, the district court examined the circumstances of the preparation and delivery of the speeches and the speeches themselves, and determined that the speeches were not written or delivered as a part of the Admiral's official duties. *Rickover, supra,* 268 F.Supp. 444 (1967). The court noted at page 449 that the only connection with the United States Government was in the purely mechanical operation of typing a final draft for duplication on Navy facilities.

We do not think that the instant case falls within the ambit of 17 U.S.C., Section 8. It is true that Major Moore was for some purposes an agent of the United States in his capacity as psychiatrist in the United States Army.

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[5] The relevant portion of 17 U.S.C., Section 8, first paragraph, reads:

> No copyright shall subsist . . . in any publication of the United States Government, or any reprint in whole or in part thereof. . . .

However, we think that Major Moore's distribution of *Desiderata* to soldiers lacks the requisite degree of governmental association or interest necessary to constitute a publication "by the Government" within the meaning of 17 U.S.C., Section 8.

Clearly, Moore was not directed or specifically authorized by Army superiors to distribute *Desiderata* to the soldiers; distribution was his own idea. At most, he continued, while treating soldiers on behalf of the government, an incident of treatment which he had found desirable in civilian practice. Presumably government personnel may have used government equipment in multigraphing the material. The district court in *Rickover, supra,* was not persuaded that the typing of a final draft of one of Rickover's speeches and duplication on Navy facilities was sufficient governmental association to defeat his copyright in the speech. Nor are we so persuaded in this case. Furthermore, although Major Moore distributed *Desiderata* in order to help his Army patients with their attitudes, such use was not nearly comparable in its significance to the governmental interest in the use of material in *Time, Incorporated* v. *Bernard Geis Associates,* 293 F.Supp. 130 (S.D.N.Y. 1968), where the presidentially convened Warren Commission valued the Zapruder film of the Kennedy assassination as one of the most important pieces of evidence before the Commission. To hold that Moore's distribution of *Desiderata* was a publication "by the Government" would result in a strained construction of 17 U.S.C., Section 8.

B. *17 U.S.C., Section 10*

Appellant has also argued that the finding of forfeiture should be set aside because in its view, Section 10 of the Copyright Act indicates that publication within the United States is an element necessary to a finding of forfeiture. Section 10 reads:

> Any person entitled thereto by this title may secure copyright for his work by publication thereof with the

> notice of copyright required by this title; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor, except in the case of books seeking ad interim protection under section 12 of this title.

Appellant argues that since the improper publication, Moore's distribution of *Desiderata*, occurred overseas, there can be no forfeiture.

We doubt that this section has any such effect, but do not find it necessary to interpret Section 10 on these facts. Clearly, there is ample room in the evidence to infer an authorized distribution of *Desiderata* by Moore while he was still in Denver, Colorado. On October 5, 1942, Moore wrote Ehrmann from Denver, ". . . I have distributed the beautiful copies which you sent me and want to thank you for them again . . ."

IV

Abandonment of the Copyright

As set forth in the district court's decision, the conclusion of abandonment rests upon a finding of Mr. Ehrmann's long-term intent to contribute *Desiderata* to the public. The reasonableness of the inferences necessary to be drawn in order to reach that finding is probably less clear than the reasonableness of those supporting a finding of forfeiture by reason of the Moore publications. We do not, however, decide the propriety of the abandonment holding because the finding of forfeiture disposes of the case.

The judgment appealed from is AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

Chicago, Illinois 60604

May 14, 1976

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. WILBUR F. PELL, JR., Circuit Judge

ROBERT L. BELL, d/b/a CRESCENDO PUBLISHING COMPANY,
Plaintiff-Appellant,

No. 75-1753 vs.

COMBINED REGISTRY COMPANY, etc.
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 72 C 1819

JOEL M. FLAUM, *Judge.*

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

APPENDIX D

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

Chicago, Illinois 60604

July 15, 1976

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. WILBUR F. PELL, JR., Circuit Judge

ROBERT L. BELL, d/b/a CRESCENDO PUBLISHING COMPANY,
Plaintiff-Appellant,

No. 75-1753 vs.

COMBINED REGISTRY COMPANY, an Illinois Corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
(72 C 1819)

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS HEREBY ORDERED that the petition for rehearing in the above-entitled appeal be, and the same is hereby, DENIED.

APPENDIX E

ROBERT L. BELL, d/b/a CRESCENDO PUBLISHERS, and CUARTA CORPORATION, d/b/a CRESCENDO PUBLISHING COMPANY,
Plaintiffs-Appellees,

v.

PRO ARTS, INC., et al.,
Defendants-Appellants.

No. 74-1232.

United States Court of Appeals, Sixth Circuit.

DECIDED AND FILED FEB. 14, 1975.

Before PHILLIPS, *Chief Judge*, MILLER, *Circuit Judge*, and DEMASCIO,* *District Judge.*

PER CURIAM:

Plaintiff-appellee Bell discovered quite by chance that defendant-appellant was distributing unauthorized renditions of the poem *Desiderata* without displaying an appropriate copyright legend. He formally advised appellant of his copyright and demanded that the appellant cease and desist from future sales of the poem. When this and several additional demands failed to deter the appellant, plaintiff filed this copyright infringement action for injunctive and monetary relief. The cause was tried before the United States District Court for the Northern District of Ohio without a jury. That court found appellee's copyright valid and infringed in several respects. There were two representations of the poem incorporated in appellant's catalogue. One included the entire text of the poem on a white background falsely representing that it was "found in Old St. Paul's Church, Baltimore, 1692." The second contained the text superimposed on a beach scene. Neither of these representations contained the copyright

* The Honorable Robert E. DeMascio, Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

legend. The district court awarded appellee damages of $5,000 as well as permanent injunctive relief. On the basis of Chief Judge Frank J. Battisti's exhaustive and well-reasoned opinion, reported at 366 F.Supp. 474, we affirm.

Appellants contend in this appeal that the trial court erred in permitting the introduction of unauthenticated evidence; in allowing the introduction of hearsay statements; in imposing damages; and in exhibiting prejudice toward appellants during the trial. We find these contentions lack merit. Appellants have not supported the allegation that the trial court received documentary evidence not properly authenticated, nor has it shown that Exhibits 6 and 10, also alleged to be unauthenticated, were relied upon by the court in its findings of infringement. Notwithstanding this failure, the parties were afforded ample opportunity to assert a valid objection to authenticity. Appellant made no such objection. Similarly, hearsay statements were not considered by the court except to permit appellee to identify the president of appellant company and his address (finding No. 19). Even assuming these statements constituted hearsay, they were not offered to prove a critical trial issue and, therefore, their admission was harmless. It is apparent that appellant's damages were not readily ascertainable. The failure of appellant to co-operate during pretrial discovery made it impossible to ascertain damages. Where actual damages are unascertainable, the court may award damages within the limits prescribed by 17 U.S.C. § 101. The award by the district court here did not exceed those limits.

Finally, we have reviewed this record and find that the judgment was amply supported by substantial evidence and that the appellant's bare allegation that the trial court was prejudiced is without merit.

Judgment is affirmed.